

Appeal No. SC95464

---

In The  
SUPREME COURT OF MISSOURI

---

KRISTINE SMOTHERMAN, Plaintiff/Appellant

and

BRIAN SMOTHERMAN, Plaintiff

vs.

CASS REGIONAL MEDICAL CENTER  
Defendant/Respondent

---

**APPELLANT'S SUBSTITUTE REPLY BRIEF**

---

Appeal from the Circuit Court of  
Cass County, Missouri  
Case No. 11CA-CV01257

---

Mark E. Parrish Mo. Bar No. 40571  
Joshua A. Sanders Mo. Bar No. 64305  
Boyd, Kenter, Thomas & Parrish, LLC  
221 W. Lexington, Suite 200  
PO Box 1099  
Independence, Missouri 64051  
PHONE: 816-471-4511  
FAX: 816-471-8450  
E-mail: mparrish@bktplaw.com  
E-mail: jsanders@bktplaw.com

Aaron N. Woods  
Mo. Bar No. 36832  
Woods Law KC, LLC  
218 NE Tudor Road  
Lee's Summit, MO 64086  
PHONE: 816-398-7877  
FAX: 816-398-7867  
E-mail: aaron@woodslawkc.com

*Attorneys for Appellant*

## TABLE OF CONTENTS

|   |    |
|---|----|
| TABLE OF CASES AND AUTHORITIES .....  | 2  |
| POINT RELIED ON .....   | 3  |
| SUMMARY OF ARGUMENT .....   | 4  |
| ARGUMENT .....  | 5  |
| I. The Trial Court Abused Its Discretion in Denying the Motion for New Trial .5               |    |
| A. Prejudice Is Presumed as a Result of Juror Misconduct.....                                 | 6  |
| B. CRMC Has Not Overcome the Strong Presumption of Prejudice.....                             | 7  |
| C. The Juror Testimony Does Not Overcome the Strong Presumption of<br>Prejudice .....         | 10 |
| D. The Extraneous Weather Data Was Material and Improperly Influenced<br>the Jury.....        | 12 |
| E. The Extraneous Weather Data Prejudicially Impeached<br>Mrs. Smotherman’s Credibility ..... | 20 |
| CONCLUSION .....  | 25 |
| CERTIFICATE OF COMPLIANCE.....  | 27 |
| CERTIFICATE OF SERVICE .....  | 27 |

## TABLE OF CASES AND AUTHORITIES

### Cases

|   |             |
|---|-------------|
| <i>Dorsey v. State</i> , 156 S.W.3d 825 (Mo. App. W.D. 2005) .....                                    | passim      |
| <i>Hubbs v. Hubbs</i> , 870 S.W.2d 901 (Mo. App. S.D. 1994) .....                                     | 11          |
| <i>Middleton v. Kansas City Pub. Serv. Co.</i> , 152 S.W.2d 154 (Mo. 1941) ....                       | 7, 8, 9, 11 |
| <i>Olson v. Christian County</i> , 952 S.W.2d 736 (Mo. App. S.D. 1997) .....                          | 11          |
| <i>State ex rel. Division of Family Services v. Brown</i> , 897 S.W.2d 154 (Mo. App. S.D. 1995) ..... | 11          |
| <i>State v. Cook</i> , 676 S.W.2d 915 (Mo. App. E.D. 1984) .....                                      | passim      |
| <i>State v. Stephens</i> , 88 S.W.3d 876 (Mo. App. W.D. 2002) .....                                   | passim      |
| <i>Travis v. Stone</i> , 66 S.W.3d 1 (Mo. banc 2002) .....  | 3, 7, 9     |
| <i>U.S. v. Davis</i> , 393 F.3d 540 (5 <sup>th</sup> Cir. 2005) .....                                 | 13, 14, 15  |
| <i>U.S. v. Mix</i> , 791 F.3d 603 (5 <sup>th</sup> Cir. 2015) .....                                   | 15          |
| <i>Ullom v. Griffith</i> , 263 S.W. 876 (Mo.App. 1924) .....  | 14          |

### Other Authorities

|                      |    |
|----------------------|----|
| MAI 2.01 .....       | 6  |
| RSMo § 494.490 ..... | 10 |

## POINT RELIED ON

I. The trial court erred and abused its discretion by refusing to grant a new trial, because a new trial was required since a juror gathered evidence extraneous to the trial and Respondent did not rebut the strong presumption of prejudice created by such juror misconduct, in that it was established that a juror gathered extraneous weather data by conducting research on the Internet for the issue of how Appellant fell and provided that information to the jury, but the Respondent did not establish that no prejudice resulted from this misconduct.

*Travis v. Stone*, 66 S.W.3d 1 (Mo. banc 2002)

*State v. Cook*, 676 S.W.2d 915 (Mo. App. E.D. 1984)

*Dorsey v. State*, 156 S.W.3d 825 (Mo. App. W.D. 2005)

## SUMMARY OF ARGUMENT

A new trial should be granted because the injection of extrinsic weather data prejudiced the Plaintiffs. Contrary to the argument of Respondent Cass Regional Medical Center (“CRMC”), statements from jurors minimizing juror misconduct have very little probative value, and such testimony cannot overcome the strong presumption of prejudice in this case.

This is especially true when the extrinsic weather information clearly has a logical connection to the consequential facts, and the offending juror agreed that the extrinsic weather data explained why water could have been on the floor that caused Mrs. Smotherman’s fall. Further, there is evidence that juror misconduct subtly and unconsciously altered jury deliberations. At least one juror believed that evidence that the date of the incident was “a snowy day” had been properly admitted at trial. Finally, the number of jurors testifying regarding the impact of the extrinsic weather information is insufficient to return a verdict in this case. The weather data may have been critical to the jurors that did not testify.

It is clear that the extraneous weather data was material; thus, the jury was subjected to improper influence, and the strong presumption of prejudice has not been rebutted. Defendant CRMC’s argument is not supported by all of the juror testimony. Juror Jacobs, after the trial, stated that he wondered if water from the

snow was tracked into the bathroom, and testified at the hearing on the Motion for New Trial that the snow explained why water could have been on the floor.

CRMC's reliance on *State v. Stephens*, 88 S.W.3d 876 (Mo. App. W.D. 2002), is misplaced. There was clearly evidence that both water and soap caused Mrs. Smotherman's fall. Accordingly, evidence of snow was an improper influence on the jury. The jury could have improperly believed that such evidence indicated that water, not soap, caused the fall, resulting in an inappropriate impeachment of Mrs. Smotherman's testimony that she slipped on soap.

This extraneous information was clearly material and caused substantial prejudice. Accordingly, the trial court abused its discretion in denying the Motion for New Trial and this Court should reverse and remand this matter for a new trial.

## **ARGUMENT**

### **I. The Trial Court Abused Its Discretion in Denying the Motion for New Trial**

The trial court erred and abused its discretion by refusing to grant a new trial, because a new trial was required since a juror gathered evidence extraneous to the trial and Respondent did not rebut the strong presumption of prejudice created by such juror misconduct, in that it was established that a juror gathered extraneous weather data by conducting research on the Internet for the issue of how Appellant fell and provided that information to the jury, but the Respondent did not establish that no prejudice resulted from this misconduct.

### A. Prejudice Is Presumed as a Result of Juror Misconduct

Juror Jacobs gathered evidence extraneous to the trial by conducting independent research about the weather conditions on the day of Mrs. Smotherman's fall. **TR 660:3-19.** He did this in direct violation of Jury Instruction Number 1, which states: "[Y]ou must not conduct your own *research or investigation into any issues* in this case. . . . You *must not conduct any independent research or obtain any information of any type* by reference to . . . the *Internet*, or any other means about any issues in this case . . . ." **LF 634-35 (emphasis added); Appellants' Appendix A5-A6; LF 650-51; TR 248:4-252:20; see also, MAI 2.01.** The weather information Juror Jacobs gathered is the exact same type of extrinsic evidence obtained in *State v. Cook*, 676 S.W.2d 915 (Mo. App. E.D. 1984). Further, Juror Moehlman explained that Juror Jacobs conveyed the evidence he obtained through his independent research to the jury members during the jury deliberations. **TR 644:22-646:13.**

The trial court even found that "Plaintiffs established that Juror Jacobs consulted the internet during the course of the trial to determine the weather forecast for Harrisonville, Missouri, on the date of [Appellant] Kristine Smotherman's fall which is at issue in this case." **LF 764 ¶ 1; Appellants' Appendix A10.** The trial court also, correctly, found that because a "juror obtained extraneous evidence during trial, the burden shift[ed] to [Respondent] to

overcome” the presumption of prejudice. *Id.* The Plaintiffs have clearly met their burden of establishing that juror misconduct occurred. In fact, Defendant CRMC does not dispute that juror misconduct occurred. Such juror misconduct created a presumption of prejudice and the burden shifted to CRMC to overcome that presumption. *Dorsey v. State*, 156 S.W.3d 825, 831 (Mo. App. W.D. 2005).

### **B. CRMC Has Not Overcome the Strong Presumption of Prejudice**

Juror statements that misconduct did not affect their deliberations is entitled to very little weight under Missouri law. Therefore, the juror testimony relied upon by CRMC cannot overcome the strong presumption of prejudice that exists in this case.

Juror testimony attempting to minimize the effect of misconduct is given little weight because a juror may sincerely claim to have been unaffected but have no awareness of the unconscious influence of the information, *State v. Cook*, 676 S.W.2d 915, 917 (Mo. App. 1984), and because of the common tendency of jurors to minimize the effect of juror misconduct. *Dorsey v. State*, 156 S.W.3d 825, 832 (Mo. App. W.D. 2005) (quoting *Travis v. Stone*, 66 S.W.3d 1, 5 (Mo. banc 2002) (citing *Middleton v. Kansas City Pub. Serv. Co.*, 152 S.W.2d 154, 158 (Mo. 1941)). These cases refute CRMC’s argument that, “as a matter of public policy, it seems reprehensible to automatically presume citizens who dutifully executed their civic responsibilities as jurors . . . should be given no opportunity to demonstrate

. . . the propriety of their verdict.” (Substitute Brief of Respondent Cass Regional Medical Center, hereinafter Respondent’s Substitute Brief, p. 30).

The presumption of prejudice does not result from any fault or culpability on the other jurors. Instead, the presumption recognizes the natural effect of juror misconduct and the natural tendency of other jurors to minimize that effect. CRMC’s effort to have this Court ignore established law should be disregarded.

CRMC’s attempt to distinguish *Middleton* ignores the language in that and other cases clearly indicating that juror testimony has little probative value. It is true that the trial court in *Middleton* incorrectly placed the burden to show prejudice on the moving party. However, this Court in *Middleton* explained that the presumption of prejudice is quite strong, and that the statements of *the jurors* minimizing the effect of the misconduct is entitled very little weight. Specifically, this Court stated that affidavits of “other jurors” (i.e., nine non-offending jurors) “had little probative value because of the common tendency of jurors to minimize the effect of misconduct.” *Middleton v. Kansas City Pub. Serv. Co.*, 152 S.W.2d 154, 160 (Mo. 1941) (emphasis added) (citations omitted).

In *Dorsey v. State*, 156 S.W.3d 825 (Mo. App. W.D. 2005), the Court of Appeals stated:

When juror misconduct involves the gathering of extraneous evidence by a juror, the presumption of prejudice is not easily overcome. In disproving

prejudice, *jurors' statements that the misconduct did not affect their deliberations "ha[ve] 'little probative value' because of the common tendency of jurors to minimize the effect of the misconduct."*

*Id.* at 832 (emphasis added) (quoting *Travis*, 66 S.W.3d at 5 (citing *Middleton*, 152 S.W.2d at 158)); *see also*, *Travis*, 66 S.W.3d at 5 (explaining that juror misconduct could subtly affect the outcome of the case); *State v. Cook*, 676 S.W.2d 915, 917 (Mo. App. 1984) (a juror may sincerely claim to have been unaffected but have no awareness of the unconscious influence of the information).

Statements from jurors that juror misconduct did not affect their deliberations should be given very little weight. This rule applies to such statements from both the errant juror and the other jurors. CRMC wants this Court to abandon this established precedent because the only evidence available to CRMC to attempt to overcome the presumption of prejudice is the testimony of other jurors. However, it is clear that such testimony has little probative value and CRMC cannot rebut the presumption of prejudice based merely on juror testimony.

Further, the evidence indicates that Juror Jacobs' misconduct had a subtle effect on other jurors, whether or not such jurors were aware of the improper influence. Juror Denise MacMillan testified:

A. I do remember the issue that it was *a snowy day*, but I just thought that was what was presented to us because they talked about the automobile

hitting a pole and making the lights go out, it's why the lights went out in the hospital, but that may have been something we were told after it was over with. . . .

**TR 693:22-694:9** (emphasis added). The jury was, however, never told during the trial that it was snowing on the day of the subject incident; in fact, the jury was not told anything about the weather. **TR 89-639**. As a result, it is clear that Juror Jacobs' misconduct influenced other jurors and illustrates why juror testimony on this matter is entitled to little probative value.

### **C. The Juror Testimony Does Not Overcome the Strong Presumption of Prejudice**

CRMC has not overcome the strong presumption of prejudice even if this Court considers and gives weight to the testimony of the other jurors. Nine jurors are required to return a proper verdict. RSMo § 494.490. At the hearing on the Motion for New Trial, nine (9) jurors testified. **TR 644:5-699:20**. Critically, *only eight of the jurors that provided testimony at the hearing joined the verdict in the case at bar*. **TR 681:10-13; LF 622; Appellants' Appendix A1**. Accordingly, Defendant CRMC did not even provide testimony that the extraneous weather data did not affect the deliberations from enough jurors to have lawfully returned a verdict. As a result, CRMC failed to rebut the presumption of prejudice.

CRMC improperly attempts to rely on affidavits from the jurors that did not testify. (Respondent's Substitute Brief, p. 42). However, the trial court correctly refused to consider the affidavits. Juror affidavits, submitted in conjunction with oral testimony, can be sufficient to *support* a motion for new trial. *See Middleton*, 152 S.W.2d at 156. In contrast, this Court in *Middleton* explained that affidavits of jurors seeking to rebut the presumption of prejudice have little probative value. *Id.* at 160. The affidavits relied upon by CRMC constitute hearsay, and the trial court was within its discretion to exclude them.

CRMC has not even argued that the trial court erred in excluding the affidavits of the three jurors who did not testify at the hearing. Instead, CRMC argues that "it would have been well within [the trial court's] discretion to consider them[.]" (Respondent's Substitute Brief, p. 42). A trial court has broad discretion over the admission of evidence. This Court should not consider affidavits that were not before the trial court. *Olson v. Christian County*, 952 S.W.2d 736, 738 (Mo. App. S.D. 1997); *Hubbs v. Hubbs*, 870 S.W.2d 901, 906 (Mo. App. S.D. 1994) (explaining that an appellate court only considers the record made in the trial court); *State ex rel. Division of Family Services v. Brown*, 897 S.W.2d 154, 159 (Mo. App. S.D. 1995) (explaining that evidence outside the trial court record is not considered on appeal).

The trial court properly excluded the affidavits of the three jurors who were not available for cross-examination. Accordingly, the trial court did not consider those affidavits and such affidavits should not be considered on appeal. CRMC failed to provide testimony that the extraneous evidence was immaterial from enough jurors to support a verdict in this case. Without such testimony, CRMC cannot rebut the strong presumption of prejudice even if this Court considers the testimony of the jurors as probative.

**D. The Extraneous Weather Data Was Material and Improperly Influenced the Jury**

The extraneous weather data was material to the central issue at trial. Accordingly, the jury was subjected to improper influence and the strong presumption of prejudice cannot be rebutted, regardless of the testimony from the non-errant jurors.

Juror Jacobs admitted to checking the weather forecast for the day of Mrs. Smotherman's fall and to commenting about that forecast to other jurors. **TR 660:3-19; 662:9-663:1.** Ashlie Brown also testified that during questioning after trial that Juror Jacobs indicated that he mentioned the weather forecast to other jurors. **TR 653:15-654:12.** Ashlie Brown also testified that Juror Jacobs "had wondered if maybe some of the water from it snowing that day had been tracked into the bathroom." **TR 653:15-654:6.** This testimony clearly shows a logical

connection between Juror Jacobs’ misconduct and the facts and issues in the present case. CRMC’s argument to the contrary simply ignores the evidence presented at the hearing on the Motion for New Trial.

Further, Mr. Jacobs agreed that snow present on the day of the incident provided an explanation for how water could have been in the bathroom. **TR 663:2-15.** Such information was important enough to Juror Jacobs that it was one of only two things mentioned when he was questioned following the trial. **TR 666:4-24.** As the Court of Appeals recognized, CRMC believed water on the floor was important enough that its “closing argument strongly suggested that, if Smotherman had slipped, it was water that caused the slip[.]” (Opinion, WD78111, p. 8). The extraneous weather information was clearly logically related to the facts and issues in this case and, therefore, material to the jury’s deliberations.

CRMC’s additional assertion that Mrs. Smotherman was “inside the hospital for some time prior to falling in the bathroom” (Respondent’s Substitute Brief, p. 28), is based on the improper assumption that Mrs. Smotherman had to be the one to track the snow or water into the bathroom, which is clearly not true.

CRMC repeatedly relies upon *U.S. v. Davis*, 393 F.3d 540, 549 (5<sup>th</sup> Cir. 2005), for the proposition that it was proper for the Court to consider the content of the extrinsic material, the way in which it was brought to the jury’s attention, and the weight of the evidence supporting the jury verdict. (Respondent’s Substitute

Brief, p. 25, 29). The only case CRMC cites to support its assertion that Missouri courts have applied the *Davis* standard is *Ullom v. Griffith*, 263 S.W. 876 (Mo.App. 1924). (Respondent's Substitute Brief, p. 29). That case did not involve juror misconduct, but instead involved a question of the effect on the jury of the plaintiff crying while testifying. *Ullom*, 263 S.W. at 877, 880. The Court of Appeals reversed and ordered a new trial because the testimony of one of the jurors "criticizing the conduct of counsel in conducting the examination indicated clearly that such juror was guilty of allowing improper influences to enter into his deliberations." *Ullom*, 263 S.W. at 880.

Further, the Court in *Ullom* indicated that juror testimony regarding the lack of impact from an improper influence is not entitled to any significant weight. The Court stated:

Nor will it do to always accept the statement of a juror that what he has said or heard will not affect his judgment. *Almost any juror will disclaim the influence upon his own mind of what he has uttered or heard in violation of his duty.*

*Ullom*, 263 S.W. at 880 (emphasis added). As a result, *Ullom* shows that the testimony relied upon by CRMC is entitled to little weight and does not overcome the strong presumption of prejudice.

Further, *Davis* is distinguishable. The Court in *Davis* explained: “If there is no reasonable possibility that the jury’s verdict was influenced by the extrinsic evidence, the trial court may properly deny the defendant a new trial.” *Id.* at 549; *see also U.S. v. Mix*, 791 F.3d 603, 608 (5<sup>th</sup> Cir. 2015). Even considering the factors and evidence championed by CRMC, it is clear that there is a reasonable possibility that the information regarding snow influenced the verdict in this case and the trial court improperly denied the Motion for New Trial.

Similarly, CRMC’s reliance on *State v. Stephens*, 88 S.W.3d 876 (Mo. App. W.D. 2002), is misplaced. (*See* Respondent’s Substitute Brief, p. 37-40). The *Stephens* case holds that materiality of the extraneous evidence is an important factor when determining whether prejudice resulted from juror misconduct because immaterial evidence is not prejudicial. *Id.* at 883-84. The Court explained that “material” evidence must have “some logical connection with the consequential facts” of the case. *Id.* at 883-84 (citations omitted). As discussed above, it is clear that the extraneous weather evidence had a “logical connection with the consequential facts” of the case. *Id.* at 883-84 (citations omitted).

As discussed in the Appellants’ Brief (Appellants’ Brief, p. 39-42, 47-51), *Stephens* involved juror obtained evidence concerning the remoteness of the park where the defendant dumped his victim’s body. *Id.* at 884. Nonetheless, the record revealed that the “remoteness” of the park was never at issue. The State’s evidence

clearly established through the testimony of several witnesses that the park was remote, the appellant never introduced any evidence to dispute the location, and the appellant even admitted that the park was remote. *Id.*

*Stephens* is dissimilar to the present case because the present case involved both evidence there was soap on the floor and evidence there was water on the floor. Mrs. Smotherman's claim was based on proving that there was soap on the floor which caused her fall. **LF 642; Appellants' Appendix A8.** Juror Jacobs' extraneous weather evidence tended to show that there was water on the floor that caused Mrs. Smotherman's fall. As a result, unlike *Stephens*, the extraneous evidence in this case did not involve an undisputed fact.

Mrs. Smotherman established that the setup of the bathroom caused soap to drip on the floor. The bathroom had a soap dispenser placed on the wall to the side of the sink. **TR 336:7-15; TR 368:18-24; Pls.' Ex. 30; Appellants' Appendix A16.** That soap dispenser dripped soap. **TR 336:20-337:1.** In fact, there was a rust stripe on the heating element beneath the soap dispenser on the wall. **TR 337:23-338:1; TR 368:18-24.**

Bailee Schlozthauer worked in "housekeeping," which was responsible for cleaning the entire hospital. **TR 333:16-334:3.** Ms. Schlozthauer testified at trial that she "would think" that the rust stripe shows that soap had been dripping from the soap dispenser onto the heating unit and down to the floor. **TR 337:23-338:7.**

She even testified that she had prior experiences where she found soap on the floor of the bathroom. **TR 339:17-20.**

Roger Keefer was the director of plant operations at the Hospital in February 2009. **TR 362:24-363:5.** Mr. Keefer agreed that the rust stripe should have notified CRMC that the soap dispenser was dripping, and he agreed that a dripping soap dispenser created a potential safety hazard. **TR 368:18-370:11.**

Further, Mrs. Smotherman testified:

**Q.** The lights go out. You are just getting up. Then what?

**A.** My feet just went completely out from underneath me.

\* \* \*

**A.** Yes. Well, no. . . . The lights had went out, and so in a panic, you know, I hurried up and finished; and as I stood the rest of the way up to finish what I was doing, I just -- like I was on roller skates.

**Q.** Well, describe -- tell me what you mean by that. Was there a rolling sensation, a slipping sensation?

**A.** It was a slipping sensation but, I mean, that's how fast it was.

**TR 439:23-440:19.**

After her fall, Mrs. Smotherman was found by a nurse in the hallway and taken to the emergency room. **TR 444:25-445:8.** While there, Mrs. Smotherman heard a nurse explain that Mr. Smotherman slipped on soap in the bathroom:

**Q.** Was there anything that you overheard while you were there at the emergency room, by anyone, related to the incident of your fall in the bathroom?

**A.** I did hear somebody talking to either another nurse or doctor, and I believe it was another nurse, stating, we found her in the hallway, *she slipped and fell in the hall bathroom on soap. . . .*

**TR 448:12-20** (emphasis added).

Dr. James Queenan was the first surgeon to see Mrs. Smotherman concerning the problems developing in her hand after the fall. **TR 451:7-453:22.** On March 6, 2009, Dr. Queenan took a history of the subject fall from Mrs. Smotherman. **TR 452:24-453:7.** Dr. Queenan's history states the following:

Ms. Smotherman is a 37-year-old white female, right-hand dominant, who fell in a dark bathroom at Cass Regional Medical Center in February 26, [2009] on her right upper extremity. This is during a power out. *The patient states that she slipped on some soap on the floor.* There had been a power outage. That particular bathroom had lighting and then that lighting went out. . . .

**Pl.'s Ex. 50** (emphasis added); **Appellants' Appendix A17-A18; TR 453:23-454:21.**

CRMC's primary contention during cross-examination of Mrs. Smotherman was that she slipped on something other than soap. CRMC repeatedly questioned Mrs. Smotherman concerning the fact that the medical records from Dr. Hafer do not mention soap. **TR 497:11-21; TR 497:22-498:11.** As a result, one of the primary issues in this case was whether Mrs. Smotherman slipped on soap or some other substance, such as water. Juror Jacob's extraneous weather evidence was material to that issue and improperly prejudiced the jury in its deliberations.

Juror Jacobs researched the weather from the day of Mrs. Smotherman's fall. Once he learned that there was snow he "wondered if maybe some of the water from it snowing that day had been tracked into the bathroom." **TR 653:15-654:6.** CRMC repeatedly argued to the jury that the jury needed to conclude that soap was on the floor to enter a verdict for Mrs. Smotherman. CRMC also introduced evidence that water was on the floor rather than soap.

Whether or not there was soap on the floor was a consequential fact in this trial. The fact that it snowed on the day of Mrs. Smotherman's fall was material to that consequential fact because it has "some logical connection with the consequential facts" of the case. *State v. Stephens*, 88 S.W.3d 876, 883-84 (Mo. App. W.D. 2002) (citations omitted). As the Western District explained:

The extraneous evidence offers another plausible explanation that, if believed, could have relieved the Medical Center of liability as the case was

instructed: that the floors were wet with water from people tracking in snow due to significant snowfall, which caused Smotherman to slip and fall. (Opinion, WD7811, p. 7). Such evidence was clearly prejudicial and CRMC has failed to overcome the strong presumption of prejudice resulting from juror misconduct. Therefore, the trial court erred in denying the Motion for New Trial and this Court should reverse the trial court's Judgment.

### **E. The Extraneous Weather Data Prejudicially Impeached**

#### **Mrs. Smotherman's Credibility**

It is also clear that Juror Jacob's extraneous weather data was actually prejudicial to Plaintiffs in this matter. That evidence tended to impeach Mrs. Smotherman's testimony regarding a critical fact issue, whether there was soap on the floor upon which she slipped. Juror misconduct that tends to impeach a parties testimony is clearly prejudicial.

In *Dorsey v. State*, 156 S.W.3d 825 (Mo. App. W.D. 2005), the presumption of prejudice was not overcome because the extraneous information had an effect on witness credibility. In that case, the victim testified that she got lost and had stopped for directions when she came upon appellant and was eventually attacked by him. The appellant testified that the victim stopped to ask about buying some drugs. A juror went to the crime scene, got lost, and told the other jurors that he got lost. *Dorsey*, 156 S.W.3d at 827-28. The Court explained that the extraneous

evidence addressed an important issue because the victim's credibility was clearly at issue. If the victim was not lost, it would undermine her credibility and supported the appellant's version of events. Thus, the juror's extraneous evidence endorsed the victim's testimony and impeached the appellant's testimony. *Id.* at 832.

Similarly, in *State v. Cook*, 676 S.W.2d 915 (Mo. App. E.D. 1984), a defendant was convicted of robbery. During the trial, a witness for the state testified that it was sunny on the day of the robbery, but some of the defendant's alibi witnesses testified that it was raining. After the jury returned the verdict, the court learned that a juror called the St. Louis University Meteorology Department to *determine the amount of rainfall* on the day of the robbery. The juror testified that he learned that there was seven one hundredths of an inch of rain on the subject day, and he told this information to one other juror. *Id.* at 916. The court of appeals concluded:

[T]he information on the rainfall may have hurt the defendant. It is not clear whether the juror believed seven one hundredths of an inch was a sufficient amount to support the witnesses' statement that it was pouring rain or if that information served to undermine the credibility of the witness.

*Id.* at 917.

This case is very similar to *Dorsey* and *Cook*. The extraneous weather data provided by Juror Jacobs supports the conclusion that water—rather than soap—was on the bathroom floor. That evidence undermined Mrs. Smotherman’s credibility and impeached her testimony that she slipped on soap on the floor. Such evidence was clearly prejudicial because it impeached Mrs. Smotherman’s testimony regarding a critical issue in this trial.

Defendant CRMC’s argument that the “potential of snowfall outside the hospital obviously had no bearing on whether or not there was soap on the floor” (Respondent’s Substitute Brief, p. 44), ignores both the extent of the improper evidence and the significance of the critical issue in this case. First, the extraneous evidence was not limited to potential for snow fall. Mr. Jacob’s extraneous information was that it had been snowing on the day of the incident. **TR 644:22-646:13; TR 697:9-14** (“Someone came in and said there was snow on the ground at that time”); **TR 693:22-694:9**.

Second, as discussed above, a critical and primary issue in this case was whether Mrs. Smotherman slipped on soap or not. Juror Jacobs’ extraneous evidence of snow serves to impeach Mrs. Smotherman’s testimony that she slipped on soap as it provides support for the evidence of water on the floor of the bathroom. **TR 663:2-15**.

CRMC's argument that the extraneous weather data was "cumulative" to properly admitted evidence of water on the floor (Respondent's Substitute Brief, p. 38-39, 44-45), highlights the prejudicial nature of the juror misconduct in this case. Jurors are not allowed to consider evidence not admitted at trial. The fact that the extraneous evidence supported CRMC's arguments shows that such evidence was prejudicial to Plaintiffs and requires a new trial.

In *Dorsey*, the victim testified that she got lost and asked for directions. The defendant testified that the victim stopped to ask about buying drugs. *Dorsey*, 156 S.W.3d at 827-28. The information regarding a juror also getting lost supported the victim's story. In other words, it supported properly admitted evidence. The court held that such information was prejudicial *because* it endorsed the victim's testimony and impeached the appellant's testimony. *Id.* at 832. The same is true here with regard to CRMC "cumulative" argument. It is clear that there was evidence of soap on the floor and evidence of water on the floor. The extraneous information here endorsed the evidence of water being on the floor and impeached Mrs. Smotherman's testimony that she slipped on soap.

The Western District, in its Opinion in this case, recognized the materiality of the extraneous evidence and the prejudice that resulted to Mrs. Smotherman.

Again, here the issue was whether Smotherman slipped, and if so, what substance she slipped on. Other than the physician's report indicating

that “she stumbled and maybe slipped on some water or something on the floor and fell,” there was no evidence that there was water on the floor, or that there was an obvious source of water on the floor. Far from “being stuck with a fact at trial,” both the existence and nature of the substance on the floor were hotly contested. The juror who improperly researched the extraneous evidence thought it important enough to mention as a reason for deciding the way he did, and the Medical Center’s closing argument strongly suggested that, if Smotherman had slipped, it was water that caused the slip: “she went to see a doctor, and the doctor states . . . that the patient states she stumbled, maybe slipped on something, some water or something on the floor and fell.” The existence, nature, and source of material on the floor was a central issue of the case. And the extraneous evidence gave the jury a reason to improperly determine that water from heavy snowfall was the cause of Smotherman’s slip and fall. The evidence is material, and went to a central issue in the case.

(Opinion, WD78111, p. 8).

Juror misconduct is presumptively prejudicial and it is clear in the present case that such misconduct was actually prejudicial. CRMC failed to overcome the strong presumption of prejudice. In fact, CRMC’s arguments support the conclusion that prejudice exists. As a result, the trial court abused its discretion in

denying the Motion for New Trial and this Court should reverse and remand for a new trial.

### CONCLUSION

It is clear that juror misconduct occurred in this case. Juror Jacobs conducted independent weather research and obtained evidence extraneous to the trial. He also provided this extrinsic weather data to the other jurors during deliberations. Accordingly, there is a very strong presumption of prejudice. Further, the information he provided about the weather was pertinent to critical issues that the jury had to decide in this case.

Whether or not there was soap on the floor was a consequential fact in this trial. The fact that it snowed on the day of Mrs. Smotherman's fall was material to that consequential fact because it has "some logical connection with the consequential facts" of the case. *State v. Stephens*, 88 S.W.3d 876, 883-84 (Mo. App. W.D. 2002) (citations omitted). Such evidence was clearly prejudicial and CRMC has failed to meet its burden to overcome the strong presumption of prejudice resulting from juror misconduct.

The trial court abused its discretion in concluding that extraneous evidence obtained and shared by Juror Jacobs was immaterial and in denying the Motion for New Trial. As a result, the Judgment entered in this case must be reversed and this matter remanded for a new trial.

Respectfully submitted,

/s/ Joshua A. Sanders

BOYD, KENTER, THOMAS & PARRISH, LLC

Mark E. Parrish Mo. Bar No. 40571

Joshua A. Sanders Mo. Bar No. 64305

221 W. Lexington, Suite 200

PO Box 1099

Independence, Missouri 64051

PHONE: 816-471-4511

FAX: 816-471-8450

E-mail: mark@mparrishllc.com

E-mail: josh@mparrishllc.com

Aaron N. Woods Mo. Bar No. 36832

Woods Law KC, LLC

218 NE Tudor Road

Lee's Summit, MO 64086

PHONE: 816-398-7877

FAX: 816-398-7867

E-mail: aaron@woodslawkc.com

***Attorneys for Appellant***

## **CERTIFICATE OF COMPLIANCE**

I certify that this Appellant's Substitute Reply Brief complies with the limitations contained in Supreme Court Rule 84.06(b), and that the entire brief, except the portions excluded by Supreme Court Rule 84.06(b), contains 4,748 words.

/s/ Joshua A. Sanders

BOYD, KENTER, THOMAS & PARRISH, LLC  
Joshua A. Sanders Mo. Bar No. 64305  
221 W. Lexington, Suite 200  
PO Box 1099  
Independence, Missouri 64051  
PHONE: 816-471-4511  
FAX: 816-471-8450  
E-mail: josh@mparrishllc.com

Attorney for Appellant

## **CERTIFICATE OF SERVICE**

I certify that a copy of this Appellant's Substitute Reply Brief was served this 25<sup>th</sup> day of April, 2016 through the electronic filing system pursuant to Supreme Court Rule 103.08 on:

Sean T. McGrevey  
Attorney for Respondent

/s/ Joshua Sanders

Attorney for Appellant